

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

06/24/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2002-000030

FILED: \_\_\_\_\_

STATE OF ARIZONA

BRUCE R OWENS

v.

CRAIG C CLEMENCE

HARRY P FRIEDLANDER

GILBERT CITY COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

GILBERT CITY COURT

Cit. No. 00CR15443MI

Charge: CT 1. CRIMINAL DAMAGE OF PROPERTY A CL TWO  
MISDEMEANOR

CT 2. INTERFERRING WITH JUDICIAL PROCEEDINGS A  
CL ONE MISDEMEANOR

DOB: 08/31/59

DOC: 10/03/00

This Court has jurisdiction of this appeal pursuant to the  
Arizona Constitution Article VI, Section 16, and A.R.S. Section  
12-124(A).

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This matter has been under advisement since its assignment on May 29, 2002, and this Court has reviewed the record of the proceedings from the Gilbert City Court, exhibits made of record and the Memoranda submitted by counsel.

The transmittal of the record for the Gilbert City Court indicates from Gilbert City Clerk, Joyce Fahey, that a transcript is forthcoming. This note on the record on appeal indicates that transcription of a tape or CD would be the responsibility of attorney for the Appellant. The only transcription which appears in the court's file is in an unusual format: The transcript is filed with the pleadings, is not bound, does not contain the name or signature of the person who performed the transcription, and is an incomplete transcript of the proceedings from the court below. This incomplete purported transcript apparently ends immediately after the trial judge denied Appellant's Rule 20 Motion, and prior to the commencement of the Defendant's case-in-chief at trial. Most importantly, Appellant has not provided this court with a transcript of his sentencing proceeding of December 20, 2001. The only transcript of those proceedings is quoted portions from some transcript, not made available to this court, quoted in Appellant's brief.

Our Rules of Procedure clearly require that a transcript of the record of the proceedings shall be prepared in all cases appealed to the Superior Court, except where other methods are established by Superior Court Local Rules.<sup>1</sup> When matters are not included within the record on appeal, the missing portion of the record is presumed to support the decision and action of the trial judge.<sup>2</sup> In the case at hand, Appellant has failed to file transcripts prepared from tape recordings of the proceedings

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<sup>1</sup> Rule 7, Superior Court Rules of Appellate Procedure-Criminal.

<sup>2</sup> State v. Mendoza, 181 Ariz. 472, 474, 891 P.2d 939, 941 (1995); Baker v. Baker, 183 Ariz. 70, 72, 900 P.2d 764, 766 (1995); State v. Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982); In re: Mustonen's Estate, 130 Ariz. 283, 284, 635 P.2d 876, 877 (App. 1981).

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from the lower court which were provided to him by the clerk of the lower court.

Appellant contends that the trial judge erred by engaging in "improper ex parte communication" with the prosecutor prior to the sentencing hearing on December 20, 2001. The portion of the record quoted by the Appellant in his memorandum does not support his arguments. The portion of the record quoted in Appellant's memorandum indicates that the discussion between the judge and the prosecutor occurred within sight of Appellant's trial counsel, and that "there were absolutely no facts discussed in this matter."<sup>3</sup> The trial judge also indicated that his discussion with the prosecutor was "simply an inquiry as to procedure...."<sup>4</sup>

Canon 3(B)(7) of the Canons of Judicial Conduct, provides in part:

A judge shall not initiate, permit, or consider ex parte communications... except that:

(a) Where circumstances require ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) The judge reasonably believes the no party will gain a procedural or tactical advantage as a result of the ex parte communication and

(ii) The judge makes provision promptly to notify all other parties

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<sup>3</sup> Appellant's brief, at page 2.

<sup>4</sup> Id.

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of the substance of the exparte  
communication and allows the an  
opportunity to respond.

It appears that Judge Phares had a question of procedure to ask the prosecutor. The question was whether she had discussed with Appellant's counsel the possibility of a stipulated sentence. The trial judge affirmed that he was not trying "to keep anything from you."<sup>5</sup> This indicates that the judge reasonably believed that neither party would gain a procedural or tactical advantage; he was verifying whether the parties had discussed a stipulated sentence. It was unnecessary for the trial judge to promptly notify Appellant's counsel of the communication because Appellant's counsel observed it and promptly asked about it when court reconvened. The trial judge could have reasonably expected Appellant's counsel to understand that the judge had asked the prosecutor about the stipulated sentence, because she contacted Appellant's counsel about that prior to the sentencing moving forward. This Court finds no improper ex parte communications not expressly permitted by Canon 3 were made, from the limited record presented to this court.

More importantly, as Appellee points out in its memorandum, Appellant's counsel did not request a change of judge or any other relief. And, this Court notes that Appellant claims no prejudice as a result of the question by the judge to the prosecutor prior to sentencing. From the nature of the question by the trial judge to the prosecutor, it does not appear that any prejudice could result to Appellant.

IT IS THEREFORE ORDERED affirming the judgments and sentences of the Gilbert City Court.

IT IS FURTHER ORDERED remanding this case back to the Gilbert City Court for all future and further proceedings in this case.

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<sup>5</sup> Appellant's brief, at page 2.  
Docket Code 512